INTERIOR BOARD OF INDIAN APPEALS

Estate of Archie Blackowl, Sr.

29 IBIA 195 (05/31/1996)

Reconsideration denied:
29 IBIA 237

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF ARCHIE BLACKOWL, SR.

IBIA 95-106 Decided May 31, 1996

Appeal from an order denying rehearing issued by Administrative Law Judge Richard L. Reeh in Indian Probate IP OK 65 P 93-1.

Reversed; will approved.

1. Indian Probate: State Law: Pretermitted Heir--Indian Probate: Wills: Failure to Mention Child--Indian Probate: Wills: Failure to Mention Spouse--Indian Probate: Wills: Revocation by Subsequent Marriage

   In the absence of substantive law or regulations on the issue of pretermitted heirs or changed circumstances, the Department of the Interior should give effect to the stated wishes of an Indian testator, as expressed in a valid will, rather than create substantive rules governing pretermission or changed circumstances within the limited context of individual probate cases.

APPEARANCES: Amos E. Black III, Esq., Anadarko, Oklahoma, for appellant; George Allen Blackowl, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Lula Jean Blackowl Smith seeks review of a March 17, 1995, order denying rehearing issued by Administrative Law Judge Richard L. Reeh in the estate of Archie Blackowl, Sr. (decedent). The March 17, 1995, order let stand a November 4, 1994, order disapproving decedent's will. For the reasons discussed below, the Board reverses Judge Reeh's orders and approves decedent's will.

Background

Decedent, Cheyenne No. 801-U-4398, was born on November 23, 1911, and died testate on September 15, 1992, in Stillwater, Oklahoma. His will was executed on March 17, 1939, and named as devisees his five then-living children, Archie Blackowl, Jr., Wilbur Wade Blackowl, Albert Attocknie Blackowl, Ardena Blackowl, and appellant.

Judge Reeh held hearings to probate decedent's trust estate on August 2, 1993, and September 20, 1993, at Pawnee, Oklahoma. On November 4, 1994, he issued an order disapproving decedent's will and determining decedent's heirs under Oklahoma laws of intestacy.

In explanation of his disapproval of decedent's will, Judge Reeh stated:

> At the time [decedent] made this will, he was married to his second wife, Faith Attocknie. At that time, he had fathered 2 children with his first wife and 3 with his second. The will distributes property to each of the 5 children.
>
> Subsequent to making this will, [decedent] had another child with Ms. Attocknie. In 1946 they were divorced. Thereafter, he married Mollie Curtis, and they had 9 children (2 of whom were adopted). [1/ Decedent] and Ms. Curtis were, thereafter, divorced. He married Lillie Rice in 1983, and they were still married when he passed away.
>
> The last will and testament submitted in this case was made 53 years, 2 wives and 10 children prior to his death. Clearly [decedent's] family circumstances changed dramatically between the time he made this will and the time of his death.
>
> Copies of certain papers dated August 4, 1992 and bearing [decedent's] signature * * * were submitted in April of 1994. These papers reflect a testamentary intent which is at variance with the 1939 will. [2/] They also bear the signature of one witness. Because they do not comply with the requirements of 43 C.F.R. § 4.260(a), however, they may not be approved as a later will. Moreover, they do not operate as a revocation of the 1939 will. See 43 C.F.R. § 4.260(c).
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> * * * * * *
>
> Under circumstances peculiar to this case, it appears evident that the 1939 will is not expressive of [decedent's] intent at the time of his death. The will's validity is impeached by the lapse of 53 years, the consummation of 2 additional marriages, the birth of 10 more children after its making and written expressions of intent which cannot be characterized as testamentary documents.

1/ In fact, the two adopted children, Lee Donna Faye Blackowl and Warfield Richard Blackowl, who are decedent's natural grandchildren, were adopted by decedent and Lillie Rice Blackowl on Mar. 13, 1990.

2/ The papers suggest that decedent wished to disinherit all his natural children and leave his entire estate to his two adopted children.

> It is obvious that the intent of Congress was to place approval of Indian wills in the hands of the Secretary of [the] Interior for the protection of native Americans. Courts have not imposed upon the Secretary any rigid rule of law in this respect. Rules of the various states are not binding upon the Department. Homovich v. Chapman, 191 F.2d 761 ([D.C. Cir.] 1951).
>
> The Secretary's discretion is not, however, completely unfettered. He cannot, in the absence of standards of general application, disapprove a will on the basis of any personal concept of equity. See Tooahnippah v. Hickel, 397 U.S. 598 (1970). While that decision upheld a will by which an illegitimate daughter of the will-maker was disinherited, the Court explored at length the authority of the Secretary with respect to Indian wills. The Court declined to "... undertake to spell out the scope of the Secretary's power," but rejected the contention "that the Secretary's authority is narrowly limited to passing on the formal sufficiency of a document claimed to be a will."
>
> In this case, I find that [decedent's] intent at the time he made this will was rational, and that there is no basis under the facts or law upon which to disapprove the will on grounds of improper execution, mistake, misrepresentation, or any principle of pretermission or exclusion of heirs from sharing in the estate. However, the will should be disapproved because of changed circumstances as a reasonable exercise of the Secretary's discretion.
>
> I believe that a proper exercise of the Secretary's discretion is to disapprove a will in extreme instances of changed family circumstances. I do not believe the Department is prohibited from disapproving a will in the absence of pretermission regulations. I am not unmindful of Interior Board of Indian Appeals (IBIA) decisions which, on their margins, address the subject. [Emphasis in original.]

(Nov. 4, 1994, Order at 2-3).

Appellant filed a petition for rehearing, which was denied by Judge Reeh on March 17, 1995.

Appellant then appealed to the Board. Her appeal was docketed on June 12, 1995. Briefs were filed by appellant and by George Allen Blackowl. 3/

3/ During the course of this appeal, several other individuals submitted documents but failed to certify that the documents had been served on other parties, as required by the Board's regulations and the notice of docketing in this appeal. These unserved documents have not been considered.

Discussion and Conclusions

Appellant contends that, in the absence of regulations promulgated under 25 U.S.C. § 373 (1994), Judge Reeh lacked authority to disapprove decedent's will on the basis of changed circumstances.

This is a subject which the Board has addressed on several occasions, most recently in the Estate of Lois Marie (Francis) Pete (Sanchez), 22 IBIA 249, 99 I.D. 196 (1992). In that case, the appellant sought to persuade the Board to overrule its decisions in the Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (1986), and the Estate of Ronald Richard Saubel, 9 IBIA 94, 88 I.D. 993 (1981), in which the Board had interpreted Tooahnippah v. Hickel, supra, to mean that, in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will on the basis of its failure to provide for a pretermitted heir.

In Sanchez, the Board undertook a reexamination of its holdings in Little Hawk and Saubel and concluded that those decisions should be modified. The Board stated in part:

> [1] Appellant first argues that the decision in Tooahnippah does not prohibit the Department from disapproving an Indian will based upon pretermission or changed circumstances. The Board has carefully considered Judge [S.N.] Willett's exhaustive analysis of the case law developments leading up to the present state of Departmental law. Upon mature reflection, the Board agrees that its cases in the area of pretermission citing Tooahnippah have "stretched" the Court's actual holding. Despite that agreement, it declines to reverse the result it has reached in previous cases and continues to hold, as discussed further infra, that, in the absence of substantive law or regulations on the issue of pretermitted heirs, the Department should give effect to the stated wishes of an Indian testator, as expressed within a valid will, rather than fill this "gap" through the adjudicative process. The Board, therefore, declines appellant's invitation to overrule the result in Little Hawk and Saubel.
>
> Appellant contends that the failure to provide rules concerning pretermission through the adjudicatory process constitutes a failure to exercise the discretion given to the Secretary under 25 U.S.C. § 373. The Board disagrees. The Board has determined that it would be inappropriate for the Secretary to exercise the discretion granted under section 373 to fill in this particular "gap" through the adjudicative process. Although appellant, as well as other disappointed individuals, will disagree with this conclusion, the Board considers it to be an informed decision, based upon its expertise in Indian probate matters and made in order to avoid the greater harm that could result from making

> potentially far-reaching determinations concerning the way in which all pretermitted heirs should be treated within the limited context of individual probate cases. A decision on the treatment of pretermitted heirs, or regarding changed circumstances, will have extensive and unique ramifications within the Indian community, the people to whom the Department, and the Federal government, owe a trust responsibility. If such a decision is made by the Department, it is more properly made in the context of a rulemaking proceeding, during which all of the people affected would have the opportunity to voice their opinions. [Footnote omitted.]

22 IBIA at 252-53, 99 I.D. at 187-88.

Nothing in Judge Reeh's analysis persuades the Board that it should alter the conclusion it reached just four years ago in Sanchez. It is true that this case involves a greater passage of time and a larger number of pretermitted heirs than is usual in cases of this nature. However while he observed that this case involves an "extreme instance[] of changed family circumstances," Judge Reeh suggested neither a definition of "extreme" nor any means of determining a cut-off point, in terms of years or number of pretermitted heirs, in which will disapprovals should be permitted on the grounds of "extreme" changed circumstances. 4/ The Board sees no obvious cut-off point. Thus, in order to affirm Judge Reeh, the Board would be compelled to overrule Sanchez, as well as its earlier decisions on this issue. The Board declines to do so.

The Board finds that judge Reeh erred in disapproving decedent's will on the basis of changed circumstances.

Judge Reeh explicitly found that no grounds for will disapproval, other than changed circumstances, were present in this case. No party has challenged that finding.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board reverses Judge Reeh's November 4, 1994, and March 17, 1995, orders.

4/ Presumably, an argument for allowing will disapproval in extreme cases, however "extreme" is defined, is that the older the will and the greater the number of pretermitted heirs, the less likely it is that the will represents the testator's intent at the time of his death.

Decedent's March 17, 1939, will is hereby approved. The Bureau of Indian Affairs shall distribute decedent's trust estate in accordance with the terms of that will. 5/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

5/ In his Nov. 4, 1994, order disapproving will, Judge Reeh stated that he had appointed himself guardian ad litem for the minor children Lee Donna Faye Blackowl and Warfield Richard Blackowl.

The role of guardian ad litem for an interested party in a probate proceeding is incompatible with the Judge's responsibility to be an impartial and objective decisionmaker. Therefore, although no party to this appeal has objected to the appointment, the Board, acting pursuant to its authority in 43 CFR 4.318, holds that it was error for Judge Reeh to appoint himself guardian ad litem for an interested party. Given its disposition of this case, the Board finds the error harmless here.